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Version: Version of Record

Link(s) to article on publisher's website:

<http://dx.doi.org/doi:10.2139/ssrn.2474131>

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2474131##

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University of Oslo

University of Oslo Faculty of Law Legal Studies
Research Paper Series
No. 2014-34

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PluriCourts Research Paper No. 14-15

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A large, abstract geometric design at the bottom of the page, composed of several overlapping, semi-transparent blue and grey rectangular blocks of varying sizes and orientations, creating a complex, three-dimensional effect.

2014

UNSTABLE IDENTITIES: THE EUROPEAN COURT OF HUMAN RIGHTS AND THE MARGIN OF APPRECIATION

1. INTRODUCTION

In the run up to the Brighton Conference the UK Parliament held a hearing with the then President of the European Court of Human Rights (ECtHR), Sir Nicolas Bratza. The hearing offers a glimpse into the two competing views of international courts through which the ECtHR is forced to navigate, the view of the Court as an international body and as a court tasked with “doing” law, albeit in a very specific subject matter. When asked about whether he would support an inclusion of a provision in the Brighton declaration of opening a dialogue between judges of the Court with national parliaments Sir Nicolas responded that “national judges are [the] natural partners [of the Court] in the sense that their role is [...] essentially the same as ours—namely to interpret and apply the Convention rights.”¹ However, the tame words of “interpret and apply” did not seem to calm the fears of some the parliamentarians for where they saw the problem with the Court is not that it was interpreting and applying the Convention, but that it was doing so dynamically. Sir Nicholas’ answer was one of puzzlement, that there was no magic in the term ‘living instrument’² and that “[i]t does not seem to me that the interpretive exercise that we carry out is different in substance from the role of national courts, either in developing the common law or indeed in updating statutes”.³ Moreover “just like the development of the common law, our [the Court’s] development has equally been incremental”.⁴ Again, this comparison of the ECtHR to a normal court did not placate the UK MPs for their view is that the Court is not a court proper but an international institution which presents problems since it is neither part of a UK governing structure (separation of powers issue) nor accountable to the UK Parliament or its citizens. This was not a controversial issue for Sir Nicholas since what the Court is is a court tasked with interpreting and applying the law, using legal technics and doctrines to decide cases and its actions are indistinguishable from any other high court – hence uncontroversial. How else would a court act like?

It is not surprising that there was no common understanding between the two sides for they start from fundamentally different notions of what the ECtHR and its role is and this fundamental difference in understanding presents a problem when the Court justifies and legitimizes its decisions. But this split in identity does not only present a problem of argumentation and legitimization but it also influences the way that the Court sees and interprets convention rights depending on what identity it wears; and when it wears more than one identity – when its members and its audience understand its function and its role in fundamentally different ways the result is unstable and messy interpretations that have problems fitting into either world view.

All legal systems work under a master narrative – the self-conception of most actors of the system itself. A master narrative is a short and simple story. It is a story about the system itself; “a governing underlying narrative that each legal system tells itself – more and less openly – about why it is constructed the way it is, why it operates as it does, and why this

¹ *Oral Evidence Taken Before the Joint Committee on Human Rights*, House of Lords, House of Commons, Doc. No. HC 873-iii, 13 March 2012, available at http://www.parliament.uk/documents/joint-committees/human-rights/JCHR_Transcript_13_March_2012_UNCORRECTED.pdf (last visited 4 October 2013).

² See Sir Nicholas’ answer to question 139, *Ibid* p. 2-3.

³ Sir Nicholas’ answer to question 140, *ibid* p. 3.

⁴ *Ibid*.

makes good sense.”⁵ A master narrative is the underlying premise upon which any legal system is based. It is a simple story because it paints the system in quick broad brushstrokes (e.g. democratic polity with separation of powers with checks and balances) and at (most) times is oblivious to the paradoxes within it. Furthermore, a master narrative is important for legitimization purposes because the actors’ legitimacy will depend on their conformity with the system’s master narrative. Therefore, legitimacy is self-referential; the yardsticks for a legitimate action are contained within the system’s master narrative, not outside of it. Venzke, in his account of how actors and courts compete over semantic authority, argues that this process of building and maintaining authority is accomplished through the different actors’ attempts at connecting their current interpretations with past practices, histories and values – in essence legitimizing their decisions by creating “content laden reference points” connecting the past to the present while trying to influence the future.⁶ Consequently, when talking about the different international courts it is important to remember that they are embedded within a master narrative that is contextual and contingent and, at different points, more or less contested; in short their argumentation ultimately depends on an account of a “good life”.⁷

It is not new in law to talk about some sort of structure of argumentation that keeps the legal decisions if not completely predictable then within the confines of well determined placeholders and positions. Talking about law generally, with the rise of formalism or positivism as the dominant narrative in law, the main line of argumentation has been to portray the law (and the people practicing it) as separate from doing morality and not beholden to mere interpretations while ultimately relying on both to make decisions.⁸ Similarly in international law argumentation is structured by ascending (based on state consent and practice) and descending (based on morality) arguments ultimately settled by moral/political considerations.⁹ The argument in this paper runs in similar but different lines – it is not that the argumentation used by the Court does not follow ascending or descending lines of argument or that it manages to stay clear from either morality or interpretation but rather the idea is that the Court has a split identity where each identity comes with its own version of ascending and descending arguments and different notions of the good life and the proper order of things which creates problems of both outcomes of interpretation and type of legitimization.

This paper deals with the issue of contested narratives, or as Robinson has put it, court identities¹⁰ – of narratives that are vying for supremacy in the ECtHR and how the Court’s split identity influences its interpretations and the margin of appreciation doctrine

⁵ Mitchel De S. O. L’Asser, ‘Judicial (Self-)Portraits: Judicial Discourse in the French Legal System’ (1995) 104 *The Yale Law Journal* 1325; Mitchel De S. O. L’Asser, *Judicial Deliberations: A Comparative Analysis of Judicial Transparency and Legitimacy* (Oxford University Press 2009); Mitchel De S. O. L’Asser, ‘Transforming Deliberations’ in Nick Huls, Maurice Adams and Jacco Bomhoff (eds), *The Legitimacy of Highest Court’s Rulings: Judicial Deliberations and Beyond* (Cambridge University Press 2009) p. 37.

⁶ Ingo Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists* (Oxford University Press 2012) p. 49-60; Ingo Venzke, ‘Understanding the Authority of International Courts and Tribunals: On Delegation and Discursive Construction’ (2013) 14 *Theoretical Inquiries in Law* (forthcoming, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2269648).

⁷ Martti Koskeniemi, *The Politics of International Law* (Hart 2011) p. 35-62.

⁸ Stanley Fish, *There’s No Such Thing as Free Speech, and It’s a Good Thing, Too* (Oxford University Press 1994) p. 141-179; but also see Michel Rosenfeld, *Just Interpretations: Law between Ethics and Politics* (University of California Press 1998) p. 33-54.

⁹ Martti Koskeniemi, *From Apology to Utopia: The Structure of International Legal Argument: Reissue with a New Epilogue* (Cambridge University Press 2005).

¹⁰ Darryl Robinson, ‘The Identity Crisis of International Criminal Law’ (2008) 21 *Leiden Journal of International Law* 925.

specifically. In the tradition of Stanley Fish¹¹ this is an exploration into an interpretative community¹² – the European Court of Human Rights – and how the contemporary transition of the international law master-narrative from a nation-centred to a post-national legal order shapes the interpretations of the provisions of the European Convention on Human Rights. While we have a good idea of what courts should do in nation-centred system, we still do not have a settled narrative about how the post-national landscape is supposed to look like.¹³ There are certainly several narratives¹⁴ vying for our attention but none of them has become the dominant, *the* master-narrative if you will. In short, we are at a verge of a paradigm shift but rather than having a clear replacement we have several competing ones. This article will explore the consequences of such a paradigm shift on the doctrine of the margin of appreciation and its interpretation at the ECtHR.

I chose the margin of appreciation doctrine as an example because its origins are fairly old and one would think that by now it would have developed into a mature and well settled doctrine. It has not. “The concept of the margin of appreciation has become as slippery and elusive as an eel. Again and again the Court now appears to use the margin of appreciation as a substitute for coherent legal analysis of the issues at stake.”¹⁵ These words are even truer today than when they were uttered back in 1996. Judge De Meyer has said that “it is high time for the Court to banish that [margin of appreciation] concept from its reasoning”¹⁶ back in 1997, albeit citing not only its circumlocution, which was evident at the time, but also the stench of relativism that it brought with it. Recently it has been said that the margin possess “a variable geometry”¹⁷, that it is a “threat to the rule of law”¹⁸ and that is a doctrine that has no more and no less than 7 factors that determine its width¹⁹; that it is a doctrine of deference

¹¹ Stanley Fish, ‘There Is No Textualist Position’ (2005) 42 *San Diego Law Review* 62; Stanley Fish, *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (Duke University Press 1989); Stanley Fish, ‘Consequences’ (1985) 11 *Critical Inquiry* 433

¹² For a good explanation of what the concept of a interpretative community comprises see Stanley Fish, *One More Time in* Gary A. Olson and Lynn Worsham (eds), *Postmodern Sophistry: Stanley Fish and the Critical Enterprise* (State University of New York Press 2004); Stanley Fish, *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* p. 141-160.

¹³ Michael P Scharf, ‘Seizing the Grotian Moment: Accelerated Formation of Customary International Law During Times of Fundamental Change’ (2010) 43 *Cornell International Law Journal* 439.

¹⁴ Jan Klabbers, Anne Peters and Geir Ulfstein, *The Constitutionalization of International Law* (Oxford University Press 2009); Nico Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (1st edn, Oxford University Press 2010); Peer Zumbansen, ‘Comparative, Global and Transnational Constitutionalism: The Emergence of a Transnational Legal-Pluralist Order’ (2012) 1 *Global Constitutionalism* 16; Mattias Kumm, ‘The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and Beyond the State’ in Jeffrey L. Dunoff and Joel P. Trachtman (eds), *Ruling the World?: Constitutionalism, International Law and Global Governance* (Cambridge University Press 2009); but also see Lucas Lixinski, ‘Narratives of the International Legal Order and Why They Matter’ (2013) 6 *Erasmus Law Review* 2 and the other articles in the issue.

¹⁵ Horne Lord Lester Hill, ‘Universality Versus Subsidiarity: A Reply’ (1998) 1 *European Human Rights Law Review* 73, p. 75

¹⁶ *Partly Dissenting Opinion of Judge De Meyer in Z v Finland, Application No. 22009/93*, Chamber Judgment, 25 February 1997.

¹⁷ Yutaka. Arai-Takahashi, ‘The Margin of Appreciation Doctrine: A Theoretical Analysis of Strasbourg’s Variable Geometry’ in Andreas Føllesdal, Geir Ulfstein and Birgit Peters (eds), (Cambridge University Press 2013).

¹⁸ Jeffrey Brauch, ‘The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law’ (2005) 11 *Columbia Journal of European Law* 113.

¹⁹ Judge Dean Spielmann, *Allowing the Right Margin the European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review?* (Centre for European Legal Studies 2012).

that possess at least four second order factors/reasons that can either be pro or against deference.²⁰ It is anything but a well-settled doctrine.

The phrase “margin of appreciation” does not exist in a vacuum, when uttered it is done so with a specific intention in mind and that intention is to give deference to an entity, in this case by the ECtHR towards national organs. The problem arises when the next set of questions (how much and why) are posed, for the answers supplied by the two factions are incompatible; one wants to give a “margin” because the organ in question has a certain amount of discretion (since it is the one that originally has to weigh facts and norms, or because it is within its legal sphere of competences) while the other wants to give that same margin because the organ in question belongs to a sovereign state and it would not be for the ECtHR as an international institution to intrude on the interpretations of the state, so long as they are within a certain “zone of legality”.²¹ For one the question is whether the right balance was struck by the national organ between the individual and public interests – or at least whether the right things were taken into considerations when the balancing was taking place. For the other it is the question of what the right balance of oversight of the ECtHR over national organs is and the balancing of individual with public interests and its proper execution, if at all on the agenda, comes in second.

The argument proceeds as follows: I first start by outlining two ideal types of narratives about the role of courts – the so-called international and constitutional using Letsas’²² early insight into the operation of the margin of appreciation (1). I then continue by using literature analysis of recent case-law where the margin of appreciation has been the deciding factor in the Court’s deliberations, most notably the Lautsi and Hurst Section and Chamber judgements and put these ideal types to bear on the Court’s argumentation (2). In conclusion I argue that the problem that the current doctrine of the margin of appreciation is facing stems from the unresolved transition through which the international system is currently going and that similar problems for justification and legitimization of court judgments will continue to pop up across the court spectrum.

2. TWO IDEAL TYPES OF NARRATIVES ABOUT INTERNATIONAL COURTS

2.1 Courts as International Institutions

Before I go into outlining the “International Ideal” a short note on the concept of ideal types as an analytical tool in legal scholarship is needed. Certainly ideal types are not new and have been used since the time of Max Weber. Their use in this article are inspired by Damaska’s *The Faces of Justice*²³ and their aim is to present the basic necessary elements of what international courts would look like *if* we were to take the nation-centred narrative to its logical extreme. It does not purport to be a description of an existing court since that is not its purpose; rather its purpose is to highlight the conditions we need to believe in in order to be true to the nation-centred narrative or its alternative.

The narrative of international courts as international institutions is familiar to all students of international law not least through the text-book explanations of the relationship

²⁰ Andrew Legg, *The Margin of Appreciation in International Human Rights Law: Deference and Proportionality* (Oxford University Press 2012).

²¹ For this second view on a margin of appreciation see Yuval Shany, ‘Toward a General Margin of Appreciation Doctrine in International Law?’ (2005) 16 *European Journal of International Law* 907.

²² Letsas calls his two concepts substantive and structural however, for the sake of clarity I will call them the international and constitutional, see George Letsas, ‘Two Concepts of the Margin of Appreciation’ (2006) 26 *Oxford Journal of Legal Studies* 705, p. 706.

²³ Mirjan R. Damaska, *The Faces of Justice and State Authority : A Comparative Approach to the Legal Process* (Yale University Press 1986).

between international law and municipal law and, as such, it derives from the basic assumptions of the international system itself.²⁴ The system as it is traditionally conceived is one of sovereign and equal states²⁵ where the states are equal in their rights and duties,²⁶ at least in an original position (their rights and duties might change subject to self-restriction e.g. entering into treaties). The idea of sovereignty implies that states are independent and have a freedom of action unless there is rule constraining this freedom.²⁷ Sovereignty also means that states are, ultimately, the source of all law, either through treaties, customs (which are state practice coupled with the *opinio juris* of states) or general principles of law found common to the various municipal systems.²⁸

Sovereign equality also dictates the general principles of the relationship between international and domestic law. In the classical sense international and national law are separate systems with their own mechanisms of law-making and law application and different notions of what makes for legitimate law. Moreover, “international law does not itself prescribe how it should be applied or enforced at the national level”²⁹ (to do so would be to prescribe a form of political system to states, something that does not jibe well with the post WWII notion of the international system³⁰) and as such it only looks at results i.e. whether a state complies or not with its international obligations regardless of how it implements those domestically.³¹ Moreover, a state cannot disregard its international obligations due to its incompatibility with municipal law.³² However, this does not imply that international law requires monism for that would be a requirement of means (making international law higher than domestic law in national settings through some sort of constitutional arrangement) rather than results. As such, it is not inconceivable that a certain action would be legal and legitimate domestically but illegal internationally.³³

This basic structure has certain implications about how courts should position themselves *vis-à-vis* states. For one, international courts, when deciding upon issues of law have to connect their decisions to the consent of states, hence the structure of Article 38 sources³⁴ where scholars and judicial decisions are only *authorities*, evidence of the law but never *the* law. Therefore, judicial decisions cannot be precedents because that would imply that courts are law-making institutions – a judicial decision only has force as between the parties of a dispute and cannot be a source of law for other disputes and states.³⁵ Moreover, the decoupled relationship between international and municipal law dictates how international courts view municipal law. It has been a long standing adage that municipal law, when it comes before international courts, is considered as a fact not as law.³⁶ It is considered as a fact for a simple reason, it is not the international court’s law, it cannot interpret or re-interpret it – it cannot save it from being incompatible with international law by re-

²⁴ For a rundown of the traditional four criteria for courts in general as applied to international courts see Chapter 9 of José E. Alvarez, *International Organizations as Law-Makers* (Oxford University Press 2005) p. 521-527.

²⁵ For an historical view of how the sovereign equality came to represent the current structure of the international system see Gerry Simpson, ‘Two Liberalisms’ (2001) 12 *European Journal of International Law* 537.

²⁶ Malcolm N. Shaw, *International Law* (Cambridge University Press 2008) p. 211-215.

²⁷ Ibid p. 211-212 but also see Nuclear Weapons Case and Kosovo Advisory Opinion

²⁸ Ibid p. ; Malcolm D. Evans (ed) *International Law* (3rd ed. edn, Oxford University Press 2010) p.

²⁹ Malcolm N. Shaw, *International Law* p. but also see Malcolm D. Evans, *International Law* p.

³⁰ Generally see Gerry Simpson, ‘Two Liberalisms’.

³¹ This has been confirmed as late as 2009 in the Avena II judgment

³² Malcolm N. Shaw, *International Law* p. 131-138; and Malcolm D. Evans, *International Law* p. 413-415.

³³ Again Avena II judgment illustrates this quite clearly.

³⁴ ICJ statute.

³⁵ Article 59 ICJ statute.

³⁶ Malcolm N. Shaw, *International Law* p. 136-137.

interpreting it in light of international law (like e.g. the German Constitutional Court can interpret the Basic Law in light of the jurisprudence of the ECtHR³⁷) – but can only take it as it is interpreted and applied by national courts. “It is French legislation, as applied in France, which really constitutes French law and if that law does not prevent the fulfilment of the obligations in France [...], the fact that the terms of legislative provisions are capable of a different construction is irrelevant”³⁸ as the PCIJ said. It’s their law and not ‘ours’ to meddle with. Put differently

From the standpoint of International Law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures. The Court is certainly not called upon to interpret the Polish law as such; but there is nothing to prevent the Court’s giving judgment on the question whether or not, in applying that law, Poland is acting in conformity with its obligations towards Germany under [international law].³⁹

Moreover, the emphasis on sovereign equality also has some implication on the methods of interpretation. For instance, similarly to the criminal law principle of *in dubio pro reo* (when in doubt, for the accused) international law has its version of ‘restrictive’ interpretation⁴⁰ which in its post WWII form is restrictive in favour of state sovereignty.⁴¹ If a provision is unclear then the default assumption is that states are jealous of their sovereignty and would want to constrict their freedom of action to the least possible extent. Another illustration when it comes to rules of interpretation is the obsession with treaty text for it is – according to the ILC at least⁴² – the text of the treaty that embodies the objective will of the parties and therefore, all interpretations should be argued through the text, put into context (context narrowly understood as in Article 31(2) of the Vienna Convention) and in light of the treaty’s object and purpose. Even the documents that are to be considered context have to have been agreed by the parties, either explicitly or implicitly.

All of this has implications for the margin of appreciation doctrine. For instance, the recurrent phrase of the ECtHR – that it is not up to the Court to substitute its finding of fact and the application of the law to the facts of a domestic court with its own view but only to determine whether this application of the law to facts was in compliance with the convention – should be understood in this light.⁴³ The Court is not doing a type of review that is akin to certain national High Courts that also do not go into fact finding but only do a review of the proper interpretation and understanding of the law (like the *Cour de Cassation* in France or

³⁷ Birgit Peters, ‘Germany’s Dialogue with Strasbourg: Extrapolating the Bundesverfassungsgericht’s Relationship with the European Court of Human Rights in the Preventive Detention Decision’ (2012) 13 *German Law Journal* 757.

³⁸ *Serbian Loans, Judgment No. 14, 1929, PCIJ, Ser. A, No. 20* p. 46-47.

³⁹ *Case concerning certain German interests in Polish Upper Silesia (The merits), Judgment No. 7, 1926, PCIJ, Ser. A, No. 07*, p. 19.

⁴⁰ For an historical development of the restrictive interpretation approach see Luigi Crema, ‘Disappearance and New Sightings of Restrictive Interpretation(S)’ (2010) 21 *European Journal of International Law* 681.

⁴¹ *Ibid* p. 684-686.

⁴² “The article as already indicated is based on the view that the text must be presumed to be the authentic expression of the intentions of the parties; and that, in consequence, the starting point of interpretation is the elucidation of the meaning of the text, not an investigation *ab initio* into the intentions of the parties.” Commentaries to the Vienna Convention on the Law of Treaties, p. 220, para. 11, 1966.

⁴³ For instance the Court has this to say in the *Sahin* case “As to how compliance with the internal rules should have been secured, it is not for the Court to substitute its view for that of the university authorities. By reason of their direct and continuous contact with the education community, the university authorities are in principle better placed than an international court to evaluate local needs and conditions or the requirements of a particular course [...]” *Leyla Şahin v. Turkey, Application no. 4774/98, Judgment (Merits and Just Satisfaction) Court (Grand Chamber), 10 November 2005*.

even the US Supreme Court that works only from a record created by the lower courts)⁴⁴ but it is rather being faithful to its international law roots. It is a difference in kind not of degree – the ECtHR does not see national law as its law, for otherwise it would see it fit to tell what the meaning of the national law should be as required by the convention rather than leaving the states to figure it out for themselves.

Moreover, when it comes to interpretation the states are the ones who have the primary right and responsibility to interpret international law. This implies that an international court needs to be mindful of state practice when interpreting treaties as per Article 31(3)(b) of the Vienna Convention on the Law of Treaties. In its most recent meeting the International Law Commission taxed with exploring the question of subsequent practice proposed in its Conclusion 2 that “Subsequent agreements and subsequent practice under article 31, paragraph 3 (a) and (b), being objective evidence of the understanding of the parties as to the meaning of the treaty, are authentic means of interpretation, in the application of the general rule of treaty interpretation reflected in article 31.”⁴⁵ Authentic interpretation in this sense needs to be contrasted to authoritative, the later belonging to international courts. In national law authentic interpretations stems from the original law giver itself, mostly either from Parliament or one of its standing committees. In international law, the state parties’ interpretation presents the authentic interpretation (as the original lawgivers) although it is “not necessarily binding”⁴⁶ but “may assist in determining whether or not the presumed intention of the parties upon the conclusion of the treaty was to give a term used a meaning which is capable of evolving over time.”⁴⁷ It is in this light that we have to put the margin of appreciation’s consensus search, as a search for subsequent practice especially in the face of evolving standards.⁴⁸

To put it with a small dose of caricature, and international court should behave like a permanent arbitration mechanism where the judges come pre-selected and the parties can simply concentrate on arguing their case. Since the courts cannot create general rules, nor make precedents, every case should be considered without reference to previous cases.

2.2. The Constitutional Ideal

Before I go on to discuss this ideal type, I wish to make one caveat clear. When I use the term “constitutional ideal” I do not mean to sketch the ideal institutional setting for a Constitutionalized international order – this is not a study of Constitutionalization of international law, there are others who have done that previously and in a better way that I can do at this time.⁴⁹ Rather what I will present here is a sketch of what a constitutional court

⁴⁴ For a contrasting view see Chris Hilson, ‘The Margin of Appreciation, Domestic Irregularity and Domestic Court Rulings in ECHR Environmental Jurisprudence: Global Legal Pluralism in Action’ (2013) 2 *Global Constitutionalism* 262, p. 284.

⁴⁵ ILC, *Report on the Work of its Sixty-fifth Session*, General Assembly, Official Records, Sixty-eighth session Supplement No. 10 (A/68/10), 2013, p. 12.

⁴⁶ *Ibid*, p. 32; the instances of when the subsequent agreements and practice is binding was left to be determined at a later session of the ILC.

⁴⁷ *Ibid* p. 24.

⁴⁸ See for instance the ILC’s *Report of its Sixty-third Session*, Official Records, Sixty-sixth Session, Supplement No. 10 (A/66/10 and Add.1), Chapter XI – Treaties Over Time, especially p. 283-284.

⁴⁹ A. Von Bogdandy, ‘Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities’ in A. von Bogdandy and others (eds), *The Exercise of Public Authority by International Institutions* (Springer 2010; Jeffrey L. Dunoff and Joel P. Trachtman, ‘A Functional Approach to International Constitutionalization’ in Jeffrey L. Dunoff and Joel P. Trachtman (eds), *Ruling the World?: Constitutionalism, International Law and Global Governance* (Cambridge University Press 2009; Jan Klabbbers, Anne Peters and Geir Ulfstein, *The Constitutionalization of International Law*; Matthias Kumm, ‘The

(not a specific one) that does not conduct abstract review of law but reviews constitutionality on a case-by-case basis should do, or rather does. The reason for this is that, as it currently stands, the ECtHR (or any other human rights court) does not do abstract review, although advisory opinions come close since they are not tied to a specific case but to a specific issue (e.g. whether reservations are compatible with the Genocide Convention) but do, however, differ since it does not compare in abstract the meaning of two norms – there is always an issue (a concrete although sometimes hypothetical act) at hand.

The first thing that comes to mind regarding an idea of constitutional review is that a constitutional court (or a High Court by any other name) is embedded within a constitutional structure be it written or not. It is part of a national legal and institutional system and sits at the apex of a judicial pyramid. In countries such as France, there might be a dual or even a triple judicial pyramid each judicial structure having jurisdiction over a specific topic area (*Conseil d'Etat* in administrative law, *Cour de Cassation* in Civil Law and *Conseil Constitutionnel* in constitutional law proper).⁵⁰ All of these courts can do rights review to a certain extent even though it is not called constitutional review as such, but rather review of *conventionalité* compliance of national law with the ECHR.⁵¹

For the sake of clarity, an ideal constitutional model would be one where there is one court tasked with doing constitutional review, part of its cases devoted to rights review. It may combine abstract review with concrete review (based on individual cases). It would be part of a constitutional structure with a separation of powers but it may or may not be embedded in a system of checks-and-balances but have different type of relationship with the other branches (parliamentary sovereignty, cooperation and coordination rather than strict checks and balances) and is not dependent on the type of remedies that it can award, either open or “hard” remedies.⁵² What is crucial is that there are certain norms, either written in a special document or dispersed through the legal system but considered to be hierarchically superior than others for which the courts and as such the highest court can judge on the compatibility of ordinary norms with superior ones.

This type of system has implications for the way that a High Court positions itself to other national courts as well as to the other constitutional branches. First of all, there would be a clearer set of rules that set out the relationship between the court and the other branches, which it will be called upon to police. More importantly for our purposes is that it can do rights review, i.e. that it can adjudicate whether a proper balance between public interests and civil/human rights has been struck by the other branches (as well as other actors in society).⁵³ In conducting this type of review a High Court would have recourse to several doctrines of deference chief among them the proportionality test which can take several forms one being the proportionality test as used by the ECtHR.⁵⁴ Through proportionality tests the main task of a High Court would be to scrutinise whether the authority that has initially taken a certain action (this could also include enacting legislation) has made a proper balance between the

Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and Beyond the State; Antje Wiener *et al.*, ‘Global Constitutionalism: Human Rights, Democracy and the Rule of Law’ (2012) 1 *Global Constitutionalism* 1

⁵⁰ For a look at the French judicial structure see Mitchel de S. O. L’E Lasser, *Judicial Deliberations: A Comparative Analysis of Judicial Transparency and Legitimacy*; Mitchel de S. O. L’E Lasser, *Judicial Transformations: The Rights Revolution in the Courts of Europe*

⁵¹ Mitchel de S. O. L’E Lasser, *Judicial Transformations: The Rights Revolution in the Courts of Europe* p.

⁵² For the type of remedies see Aruna Sathanapally, *Beyond Disagreement: Open Remedies in Human Rights Adjudication* (Oxford University Press 2012).

⁵³ George Letsas, ‘Two Concepts of the Margin of Appreciation’ p. 706-715.

⁵⁴ Alec Stone Sweet and Jud Mathews, ‘Proportionality Balancing and Global Constitutionalism’ (2008) 47 *Columbia Journal of Transnational Law* 73.

public interests and the individual right while employing adequate means.⁵⁵ The standards of review can be a simple reasonableness test, which implies a very high deference, to a heightened scrutiny which implies a very low level of deference. The proportionality test that the ECtHR uses can be used on a sliding scale that can denote both a reasonableness standard and a heightened scrutiny standard. Rather than showing deference because of the sovereignty or democratic pedigree of the institution at hand, the deference is, rather, shown because of greater expertise of the body or because the constitutional arrangement puts the discretion of such a decision in the hands of the institution which act is under review. This does not mean that “anything goes” just because that institution has a constitutional power to regulate in a certain sphere, it still has to do so in a manner that does not unduly infringe on rights.

In a national setting a High Court (even ordinary courts) can interpret and re-interpret national law and point the deficiencies of reasoning of other institutions, including parliaments. Moreover, they can also interpret international law (the opposite is not the case they do not take international law to be only a fact but consider the possible interpretations of international law)⁵⁶ and present their interpretation as being an authentic interpretation albeit of that state only.⁵⁷

3. That Slippery Doctrine

In its early incarnation, the margin of appreciation doctrine was imported from the French *Conseil d'Etat*, although similar deference doctrines exist in most Continental administrative law systems, with the German being the most elaborate.⁵⁸ In most systems where rights review exists there is some sort of a deference doctrine in use since most of the time it involves issues where executive organs make first instance decisions acting with a certain prescribed limits of discretion and courts, as mechanisms of oversight, do not wish to substitute their judgment with that of the organs – within reason. Depending on the type of organ and the type of issue at hand (whether it is an administrative or a legislative organ, whether it is exercising functions granted to it by a Constitution or statute for example) there is a wider or narrower room for deference.

Unfortunately for the ECtHR, importing a domestic deference doctrine within its deliberations – even one that is part and parcel of rights jurisprudence – carries problems since we can hardly call the ECtHR a national or a constitutional court embedded within a constitutional system. Consequently, the margin of appreciation doctrine has found itself to be in the midst of a tug-of-war – is it to be a familiar type of deference doctrine of the rights litigation kind or is it to be a something more, a deference doctrine suited for a world of sovereign nation states? In the next pages I will show this tug-of-war by through literature analysis of the reasoning of two controversial judgments, the *Hirst* and the *Lautsi* Section and Grand Chamber judgments to show how the influence of the two identities of the ECtHR, the constitutional and the international, shape the discussion around the margin.

⁵⁵ *ibid* p. 74-77.

⁵⁶ A good example of this was the *Pinchet I* and *III* cases where the UK House of Lords had to interpret the Convention on the Prevention of Torture as well as the way it had been incorporated into national law.

⁵⁷ This then becomes something to be considered by other international and national actors that also interpret international law *see* for instance André Nollkaemper, *National Courts and the International Rule of Law* (Oxford University Press 2011) as for a pluralist setting of international law *see* Nico Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law*

⁵⁸ Yutaka Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Intersentia 2002), p.

The *Lautsi* case revolved around the issue of whether mandating the placement of the crucifix in public schools violates the parents' right to education under Article 2, Protocol 1. The Chamber took a very noticeable constitutional rights review approach. It started with listing the principles behind Art. 2, P. 1 built up over the years through the Courts case-law. It said that:

It is on to the fundamental right to education that is grafted the right of parents to respect for their religious and philosophical convictions ... [that it] aims at safeguarding the possibility of pluralism in education which possibility is essential for the preservation of the "democratic society" as conceived by the Convention ... [that the respect] for [the] parents' convictions must be possible in the context of education capable of ensuring an open school environment which encourages inclusion rather than exclusion, regardless of the pupils' social background, religious beliefs or ethnic origins. Schools should not be the arena for missionary activities or preaching ... [that the] State, in fulfilling the functions assumed by it in regard to education and teaching, must take care that information or knowledge included in the curriculum is conveyed in an objective, critical and pluralistic manner. The State is forbidden to pursue an aim of indoctrination that might be considered as not respecting parents' religious and philosophical convictions. That is the limit that must not be exceeded [and that the] [r]espect for parents' religious convictions and for children's beliefs implies the right to believe in a religion or not to believe in any religion [and that the] State's duty of neutrality and impartiality is incompatible with any kind of power on its part to assess the legitimacy of religious convictions or the ways of expressing those convictions. In the context of teaching, neutrality should guarantee pluralism.⁵⁹

In the application of the principles the Chamber said that

the Court must consider whether the respondent State, when imposing the display of crucifixes in classrooms, ensured that in exercising its functions of educating and teaching knowledge was passed on in an objective, critical and pluralist way, and respected the religious and philosophical convictions of parents ... [that] [i]n order to examine that question, the Court will take into account in particular the nature of the religious symbol and its impact on young pupils, especially the applicant's children, because in countries where the great majority of the population owe allegiance to one particular religion the manifestation of the observances and symbols of that religion, without restriction as to place and manner, may constitute pressure on students who do not practise that religion or those who adhere to another religion ... [that] the symbol of the crucifix has a number of meanings among which the religious meaning is predominant, [that] [t]he presence of the crucifix may easily be interpreted by pupils of all ages as a religious sign, and they will feel that they have been brought up in a school environment marked by a particular religion. What may be encouraging for some religious pupils may be emotionally disturbing for pupils of other religions or those who profess no religion. That risk is particularly strong among pupils belonging to religious minorities. Negative freedom of religion is not restricted to the absence of religious services or religious education. It extends to practices and symbols expressing, in particular or in general, a belief, a religion or atheism. That negative right deserves special protection if it is the State which expresses a belief and dissenters are placed in a situation from which they cannot

⁵⁹ *Lautsi Chamber judgment* para. 47.

extract themselves if not by making disproportionate efforts and acts of sacrifice [and that] [t]he Court cannot see how the display in state-school classrooms of a symbol that it is reasonable to associate with Catholicism (the majority religion in Italy) could serve the educational pluralism which is essential for the preservation of “democratic society” within the Convention meaning of that term. [And finally] [t]he Court considers that the compulsory display of a symbol of a particular faith in the exercise of public authority ... restricts the right of parents to educate their children in conformity with their convictions and the right of schoolchildren to believe or not believe. It is of the opinion that the practice infringes those rights because the restrictions are incompatible with the State's duty to respect neutrality in the exercise of public authority, particularly in the field of education.⁶⁰

It is a long read I know, but this is to show that there was nothing extraordinary in the Chamber's reasoning, nothing extraordinary that is for a Supreme or Constitutional court rights review. It focused on the general principles deduced from the nature of the right in question and the Court's own case law; it paid homage to the purposes of the founding document, the preservation of a pluralistic and democratic society; it emphasized the State's duty of neutrality between the competing belief systems, and securing an individual's right to educate one's children in one's belief system. It talked about the possible impact of the symbol of the cross on young children and their possible feeling of exclusion in relation to the State's duty to provide a neutral and plural education system free of indoctrination (taken together it has somewhat of an oxymoronic feeling to it but ...). In short, a text-book case of Con Law 101 argumentation on the separation of church and state. It did not, however, mention the margin of appreciation doctrine even though the Government argued for it.⁶¹ Nevertheless, given the Court's description of the margin of appreciation, namely: “that [t]he scope of this margin of appreciation is not identical in each case but will vary according to the context [... and that] [r]elevant factors include the nature of the Convention right in issue, its importance for the individual and the nature of the activities concerned”⁶² one can argue that the Chamber did in fact do a margin of appreciation analysis, it just did not invoke it specifically, it did not argue through the language of the “prongs” of the margin of appreciation “test” even though it looked at the importance of the convention right (for a plural and a democratic society), the impact to the individual (feeling of exclusion) and the nature of the activities concerned (learning under the cross in a public school).⁶³ Moreover, notice that this description (and this is one of several descriptions) of the margin is a typical description of the balancing of rights with public interests (nature of the right and its importance for individual autonomy, and the nature of the activities of the public organ i.e. the nature of the public interest at stake). Assign different values for each question and in the end you have your balancing on a scale – the scale tips this way or dependent on the value of each element added for the individual or for the public interest.

We can compare this type of reasoning to the case that is most similar to *Lautsi* the German *Classroom Crucifix II Case* which revolved around the issue of a Bavarian school ordinance which mandated the display of the crucifix in every elementary school classroom.⁶⁴ Rather than deciding under the rubric of the right to education, the Federal Constitutional

⁶⁰ Ibid. para. 49-57.

⁶¹ Ibid., para. 38-41.

⁶² *Dissenting Opinion of Judge Malinverni Joined by Judge Kalaydjieva, Lautsi Grand Chamber judgment* para.

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⁶³ Also see *ibid.*

⁶⁴ *Classroom Crucifix II Case*, 93 BVerfGE I (1995), but also see Donald P. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* (2nd ed. edn, Duke University Press 1997) p. 472-483.

Court (FCC) decided the case on freedom of religion grounds. However, the similarity in justification should be noted. For instance, in its opinion the FCC, when discussing the role of the state in relation to religion said that

Article 4(1) does not simply command the state to refrain from interfering in the faith commitments of individuals or religious communities. It also obliges the state to secure for them a realm of freedom in which they can realize their personalities within an ideological and religious context. The state is thus committed to protect the individual from attacks or obstructions by adherents of different beliefs or competing religious groups. Article 4(1), however, grants neither to the individual nor to the religious communities the right to have their faith commitments supported by the state. On the contrary, freedom of faith as guaranteed by Article 4(1) of the Basic Law requires the state to remain neutral in matters of faith and religion. [...] it must take care not to identify itself with a particular community.⁶⁵

Moreover, the Court went out of its way to emphasize the difference in circumstances between the exposure to religious festivities or symbols of the majority religion in the public square from those imposed by the state at state institutions where “students who do not share the same faith are unable to remove themselves from its presence and message.”⁶⁶ While “no state, even one that universally guarantees freedom of religion and is committed to religious and ideological neutrality, is in position to completely divest itself of the cultural and historical values on which social cohesion and attainment of public goals depend” nevertheless, even when it is permitted for the state to introduce Christian values in schools, “this presupposes [...] that coercion is reduced to an indispensable minimum” and that “the school must not proselytize on behalf of a particular religious doctrine or actively promote the tenets of” a faith.⁶⁷ Furthermore, “[i]n a pluralistic society [...] the state, in setting up a system of compulsory public school instruction, cannot possibly satisfy all educational goals or needs” nevertheless “in resolving the inevitable tension between the negative and positive aspects of religious freedom, and in seeking to promote the tolerance that the Basic Law mandates, the state, in forming the public will, must strive to bring about an acceptable compromise” while at the same time “foster[ing] the autonomous thinking that Article 4 [...] secures within the religious and ideological realms”.⁶⁸

And finally,

Parents and pupils who adhere to the Christian faith cannot justify the display of the cross by invoking their positive freedom of religious liberty. All parents and pupils are equally entitled to the positive freedom of faith, not just Christian parents and pupils. The resulting conflict cannot be resolved on the basis of majority rule since the constitutional right to freedom of faith is particularly designed to protect the rights of religious minorities. Moreover, Article 4(1) does not provide the holders of the constitutional right with an unrestricted right to affirm their faith commitments within the framework of public institutions. [...] in all of these [religious] activities must be conducted on a voluntary basis and the school must ensure that students who do not wish to participate in these activities are excused from them and suffer no discrimination because of their decision not to participate. The situation is different with respect to the display of the cross. Students who do not share the same faith are unable to remove themselves from its presence and message. [...] it would be incompatible with the principle of practical concordance to suppress completely the feelings of people of different beliefs in order to enable

⁶⁵ *Ibid* p. 473-474

⁶⁶ P.478

⁶⁷ P. 476-477.

⁶⁸ *Ibid* p. 477.

the pupils of Christian beliefs not only to have religious instruction and voluntary prayer in the public schools, but also to learn under the symbol of their faith even when instructed in secular subjects.⁶⁹

My point with this comparison is not to say that the Section “got it right” and the Grand Chamber “got it wrong,”⁷⁰ or that there is only one way of deciding this issue. My point is that, unlike the Grand Chamber’s analysis, which follows below, constitutional courts care a great deal about whether an institution, while following its constitutionally granted powers, makes the correct or nearly correct balancing between public and majoritarian interests and individual rights and interests. In this sense it does not matter much if the act at hand is a duly promulgated law of a the democratically elected representative organ acting under the powers granted to it by the federal constitution, for it is not a question of whether that organ has acted under its sovereign powers but whether it has struck the proper balance between competing public (majoritarian) and private (individual) interests and this is regardless of whether other federal entities have done the same or similar things. It’s a difference in mind-set rather than semantics. It is no surprise that Justice De Meyer says that

It is possible to envisage a margin of appreciation in certain domains. It is, for example, entirely natural for a criminal court to determine sentence - within the range of penalties laid down by the legislature - according to its assessment of the seriousness of the case. But where human rights are concerned, there is no room for a margin of appreciation which would enable the States to decide what is acceptable and what is not. [...] It is for the Court, not each State individually, to decide that issue, and the Court’s views must apply to everyone within the jurisdiction of each State.

It is no surprise since he sees the Court as the constitutional court of Europe. And that would be the Court’s task had it been the constitutional court of Europe but since it also has to struggle with its international identity things are more complicated than that and other structural issues have to be taken into account.

Now let us turn to the Grand Chamber. In the discussion on general principles it said that Art. 2 of P. 1

should be read in the light not only of the first sentence of the same Article, but also, in particular, of Article 9 of the Convention [...], which guarantees freedom of thought, conscience and religion, including the freedom not to belong to a religion, and which imposes on Contracting States a “duty of neutrality and impartiality” [and] [i]n that connection, [...] States have [the] responsibility for ensuring, neutrally and impartially, the exercise of various religions, faiths and beliefs. Their role is to help maintain public order, religious harmony and tolerance in a democratic society, particularly between opposing groups [...] the requirements of the notion of “respect”, [...] vary considerably from case to case, given the diversity of the practices followed and the situations obtaining in the Contracting States. As a result, the Contracting States enjoy a wide margin of appreciation in determining the steps to be taken to ensure compliance with the Convention with due regard to the needs and resources of the community and of individuals. In the context of Article 2

⁶⁹ *Ibid* p. 478.

⁷⁰ For that see Paolo Ronchi, ‘Crucifixes, Margin of Appreciation and Consensus: The Grand Chamber Ruling in *Lautsi V Italy*’ (2011) 13 *Ecclesiastical Law Journal* 287; but also see Lorenzo Zucca, ‘Lautsi: A Commentary on a Decision by the Ecthr Grand Chamber’ (2013) 11 *International Journal of Constitutional Law* 218.

interpreted to mean that parents can require the State to provide a particular form of teaching [...] [and] the setting and planning of the curriculum fall within the competence of the Contracting States. In principle it is not for the Court to rule on such questions, as the solutions may legitimately vary according to the country and the era [and moreover] does not prevent States from imparting through teaching or education information or knowledge of a directly or indirectly religious or philosophical kind. It does not even permit parents to object to the integration of such teaching or education in the school curriculum. On the other hand, as its aim is to safeguard the possibility of pluralism in education, it requires the State, in exercising its functions with regard to education and teaching, to take care that information or knowledge included in the curriculum is conveyed in an objective, critical and pluralistic manner, enabling pupils to develop a critical mind particularly with regard to religion in a calm atmosphere free of any proselytism. The State is forbidden to pursue an aim of indoctrination that might be considered as not respecting parents' religious and philosophical convictions. That is the limit that the States must not exceed.⁷¹

When it came to apply the principles the relevant case at hand it said that the State had a duty to respect the rights of the parents to “ensure the education and teaching of their children in conformity with their own religious and philosophical convictions”, that the “crucifix is above all a religious symbol” that “[t]here is no evidence before the Court that the display of a religious symbol on classroom walls may have an influence on pupils and so it cannot reasonably be asserted that it does or does not have an effect on young persons whose convictions are still in the process of being formed” and that be that as it may “the applicant's subjective perception is not in itself sufficient to establish a breach”. Furthermore, even though the decision on whether to perpetuate or not a tradition “falls in principle within the margin of appreciation” that in itself “cannot relieve a Contracting State of its obligation to respect the rights and freedoms enshrined in the Convention and its Protocols”. However, it also said that “[t]he fact remains that the Contracting States enjoy a margin of appreciation in their efforts to reconcile exercise of the functions they assume in relation to education and teaching with respect for the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions” even though it “goes hand in hand with European supervision” and that “[t]he Court therefore has a duty in principle to respect the Contracting States' decisions in these matters, including the place they accord to religion, provided that those decisions do not lead to a form of indoctrination.” Placing the cross in a classroom, though, does not amount to indoctrination because “a crucifix on a wall is an essentially passive symbol” and it “cannot be deemed to have an influence on pupils comparable to that of didactic speech or participation in religious activities.”⁷²

On the point of the margin of appreciation and the proper role of the Court the Grand Chamber said that the “Court must [...] take into account the fact that Europe is marked by a great diversity between the States of which it is composed, particularly in the sphere of cultural and historical development” that it “therefore has a duty in principle to respect the Contracting States' decisions in these matters [of education and building a curriculum], including the place they accord to religion, provided that those decisions do not lead to a form of indoctrination” and that that “the decision whether crucifixes should be present in State-school classrooms is, in principle, a matter falling within the margin of appreciation of the respondent State. Moreover, the fact that there is no European consensus on the question of the presence of religious symbols in State schools [...] speaks in favour of that

⁷¹ Lautsi Grand Chamber judgment para. 59-62.

⁷² Ibid. para. 63-77.

approach.”⁷³ Distinguishing, or rather differently linking the case of *Dahlam* (which involved Switzerland’s dismissal of a teacher who wore a head scarf in class because it intended to protect the pupils’ religious beliefs) and *Lautsi* the Grand Chamber said that the margin of appreciation cuts both ways and that in a field of diverse application like religion in schools what matters is not the nature of the Convention right in issue, its importance for the individual and the nature of the activities concerned but rather whether the “authorities had duly weighed the competing interests involved.”⁷⁴ It is a hands-off approach, one that looks into certain formal requirements of whether the Italian authorities considered the right things and not whether they did the right thing.

Moreover, the concurring opinion of Judge Rozakis makes the head-counting manoeuvre more explicit. He starts from re-branding the issue to one not of the right to education of children but to the right of the parents weighed with the “right of society, as reflected in the authorities’ measure in maintaining crucifixes on the walls of State schools, to manifest their (majority) religious beliefs.” In this balancing the question emerges of where should the Court stand? According to Judge Rozakis the Court’s answer is straightforward “from the part dealing with the overview of law and practice in the member States of the Council of Europe with regard to the presence of religious symbols in “State schools” [...] [it is clear]: there is no consensus among European States” and regarding the proper role of the Court

It should be observed here, while we are on the subject of a consensus, that the Court is a court of law, not a legislative body. Whenever it embarks on a search for the limits of the Convention's protection, it carefully takes into consideration the existing degree of protection at the level of the European States; it can, of course, afford to develop that protection at a level higher than the one offered by a specific respondent State, but on condition that there are strong indications that a great number of other European States have already adopted that degree of protection, or that there is a clear trend towards an increased level of protection. ... In view of the fact that there is still a mixed practice among European States on the issue, the only remaining guidance for the Court in achieving the correct balance between the rights involved comes from its prior case-law. ... The question which therefore arises at this juncture is whether the display of the crucifix not only affects neutrality and impartiality, which it clearly does, but whether the extent of the transgression justifies a finding of a violation of the Convention in the circumstances of the present case. Here I conclude, not without some hesitation, that it does not. (emphasis not in the original)⁷⁵

The question that begs to be asked here is where did Judge Rozakis’ hesitation come from? Surely not from the same case-law that was cited by both the Chamber and the Grand Chamber, for as Judge Rozakis states clearly the first thing that one should look at is whether there is a mixed practice of European states, for if there isn’t one, if there is a uniform practice then the Court’s case-law be damned. What seems compelling is not the strength of the Court’s case law either way but the Court’s view of its proper role, for if the Convention is the representation of European public order then surely the right question would not be whether the Italian authorities (both administrative, legislative and judicial) did some sort of reasonable balancing between the rights of the individuals and the religious sentiments of the majority, but whether they struck the right balance as required by the Convention. If one needs to see a broad consensus on the issue before a right becomes a right then can there be a

⁷³ *Ibid.*

⁷⁴ *Ibid.*

⁷⁵ *Concurring Opinion of Judge Rozakis Joined by Judge Vajic, Lautsi Grand Chamber Judgment.*

greater consensus than the ratification of the Protocol? Would a court of law take an opinion poll before deciding what the law is?⁷⁶ But even Judge Rozakis' opinion does not take the lack of a European consensus as the sole and only issue that counts, but rather the one that tips the scales for the review of case-law and the principles enshrined therein do matter since they are the "remaining guidance" for adopting a higher protection than the one a State offers. And this is the critical point for it asks the question of who sets the minimum standard of protection, the states or the Court? If it is the Court then it does not matter that a majority of states do not fulfil that standard but whether that standard is a plausible interpretation of the convention rights. If it is the states, then the only way that the Court can raise the standards of protection is if it follows a trend of state practice. If it is a court tasked with deciding on issues of a convention that is the public law of Europe then it can raise the standards of protection based on reasoning and methodology that is no different from any other High Court (including the living instrument doctrine or something similar) regardless of whether the majority of states comply with those standards or not. That was the point of Sir Bratza's comments.

However, if it is an international court then its interpretation has to be tied to the consensus of the member states – their state practice – for anything else would be an encroachment of sovereignty and therefore, outside of the Court's purview. To put it another way, this can work in the reverse – if the Central and Eastern European states on mass decide to curtail gay rights then that will nullify a pre-existing consensus and would signify a trend which would endanger the current case-law of the Court. Would that also translate to a higher margin of appreciation for states? Your answer will depend on how you see the ECtHR and its proper role but whatever answer you give will run afoul of one of the narratives. It is not surprising that Judge Rozakis tries but ultimately falls short of reconciling the two by putting the Court's case law as a residual guidance once the consensus search fails coming only after the practice of the state parties regardless of how strong the case law trend is.

The split personality of the Court is also clearly visible in the *Hirst* case dealing with the right of prisoners to vote. Maybe the best place to start is from the arguments of the UK government. The UK Government argued that "the right to vote was not absolute and that a wide margin of appreciation was to be allowed to Contracting States in determining the conditions under which the right to vote was exercised" that the Chamber "failed to give due regard to the extensive variation between Contracting States on the issue of voting by convicted prisoners, ranging from no prohibition to bans extending beyond the term of the sentence." Moreover, "the matter had been considered fully by the national courts applying the principles of the Convention under the Human Rights Act 1998, yet the Chamber paid little attention to this fact while concentrating on the views of a court in another country" where the case "was interpreted by domestic courts to which the doctrine of the margin of appreciation did not apply." Furthermore, the Chamber "had erred in effectively assessing the compatibility of national law *in abstracto*" that the interference with the right to vote pursued "legitimate aims of preventing crime and punishing offenders and enhancing civic responsibility and respect for the rule of law by depriving those who had breached the basic rules of society of the right to have a say in the way such rules were made for the duration of their sentence." In addition the "measure was also proportionate as it only affected those who had been convicted of crimes sufficiently serious" and as to the charge or arbitrariness in the UK's measure it argued "that, unless the Court were to hold that there was no margin of

⁷⁶ On the questionable past of the US Supreme Court's look into consensus and public opinion in its decision-making see Jeffrey A Brauch, 'Dangerous Search for and Elusive Consensus: What the Supreme Court Should Learn from the European Court of Human Rights, The' (2008) 52 *Howard LJ* 277

appreciation at all in this context, it had to be accepted that a line must be drawn somewhere.”⁷⁷

The logic of the UK argument is clear. First it argues for the margin of appreciation as a structural argument, starting from the notion that the right in question was not absolute and that a disparity in application at a European level was eminent giving it a wide margin. Domestic case-law not part of the implementation of the convention does not and should not be considered by the Court since as national authorities they do not use a margin of appreciation reasoning and that an international court cannot do *in abstracto* review (invoking the spectre of a Kelsenian Constitutional court) but has to stick to the case at hand. However, it still felt compelled to also argue the issue of proportionality and to rebut the charge of arbitrariness (although invoking the margin of appreciation at the same time).

The Court’s answer, albeit rather long, was in essence to confirm the Chamber’s reasoning. It said that right to vote, as found in Art. 3 of P. 1 “guarantees individual rights, including the right to vote and to stand for election” and it went on to “highlight the importance of democratic principles underlying the interpretation and application of the Convention” by saying that the rights at issue in this case “are crucial to establishing and maintaining the foundations of an effective and meaningful democracy governed by the rule of law. Therefore, “the right to vote is not a privilege” and “[u]niversal suffrage has become the basic principle.” Nevertheless, “[t]here are numerous ways of organising and running electoral systems and a wealth of differences, *inter alia*, in historical development, cultural diversity and political thought within Europe which it is for each Contracting State to mould into their own democratic vision.” However, it is, “for the Court to determine in the last resort whether the requirements of Article 3 of Protocol No. 1 have been complied with; it has to satisfy itself that the conditions do not curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness;.” The operative test in this case, as developed by the Court’s case-law is “namely, the legitimacy of the aim and the proportionality of the measure.”⁷⁸ Applied to the case, the Court acknowledged that the ground cited by the UK government fall within the legitimate aims that can be pursued by a State and went on to consider the issue of proportionality. Regarding the issue of proportionality, the Court noted that the number of people striped of their vote was substantive, that the issue was not substantially considered by the British Parliament, that the national courts deferred to Parliament’s assessment and that, therefore, the British Parliament did not manage to sufficiently distinguish between categories of prisoners and offenders, in other words did not narrowly tailor its means of achieving the legitimate aim so sought.⁷⁹ So far so good, the proportionality review in its essence. It, nevertheless, still decided to do a margin of appreciation analysis, or at least a margin of appreciation argument. Responding the UK’s claim of a wide margin it said that a) “that it is a minority of Contracting States in which a blanket restriction on the right of convicted prisoners to vote is imposed or in which there is no provision allowing prisoners to vote (13); and b) “even if no common European approach to the problem can be discerned, this cannot in itself be determinative of the issue.” “Therefore, while the Court reiterates that the margin of appreciation is wide, it is not all-embracing.”⁸⁰ And so much for the margin, since what follows is a typical proportionality reasoning by saying that

although the situation was somewhat improved by the 2000 Act which for the first time granted the vote to persons detained on remand, section 3 of the 1983 Act

⁷⁷ *Hirst Grand Chamber judgment* para. 47-52.

⁷⁸ *Ibid.* para. 56-52.

⁷⁹ *Ibid* para.

⁸⁰ *Ibid.* para. 72-84.

remains a blunt instrument. It strips of their Convention right to vote a significant category of persons and it does so in a way which is indiscriminate. The provision imposes a blanket restriction on all convicted prisoners in prison. It applies automatically to such prisoners, irrespective of the length of their sentence and irrespective of the nature or gravity of their offence and their individual circumstances. Such a general, automatic and indiscriminate restriction on a vitally important Convention right must be seen as ... being incompatible with Article 3 of Protocol No. 1.⁸¹

I must admit, there is a slight of hand in my quote of that last sentence from the Court's judgment, for I omitted a section that reads "falling outside any acceptable margin of appreciation, however wide that margin might be, and as". The reason for the omission is obvious, it is to show that that particular sentence does nothing, contributes nothing, neither to the "proportionality" nor to the "margin" review of the court. Absent that sentence, the standard of review would be the typical, run-of-the-mill "reasonableness" or "rational basis" standard employed in constitutional rights review. The concurring opinions say as much when they say "[i]n other, more general words, more would have been said by asserting that measures of exclusion must be "reasonable" than by referring to a "wide" margin of appreciation"⁸² and "[t]he lack of a rational basis for that provision is a sufficient reason for finding a violation of the Convention, without there being any need to conduct a detailed examination of the question of proportionality."⁸³

But once it is understood what that sentence does not do, one understands what it is supposed to do and what it is supposed to do is to show that the court made a structural argumentation regarding the margin of appreciation where the lack of a common standard and the "wideness" of the margin was deflected and where it has sought to show that despite the existence of this "wide" margin the UK measure is still beyond it. But what brings it beyond is never stated since a normal proportionality review is what the Court is left with.

And what brings it in the margin of appreciation side of the review is something that the dissenting opinion⁸⁴ does in its reasoning. They start with their argumentation by realigning the issue for the court, for what the dissenters see in the restriction of the right to vote of prisoners as being nothing different from other restrictions "on the right to vote that are of a general character, provided that they are not arbitrary and do not affect "the free expression of the opinion of the people", examples being conditions concerning age, nationality, or residence."⁸⁵ In here, prisoners are no different from minors, immigrants or emigrants – they have no say in the way the polity is run. They further continue in their re-characterisation by making the issue of the margin as an issue of the proper role of the Court especially in "developing human rights and the necessity to maintain a dynamic and evolutive approach in its interpretation of the Convention and its Protocols in order to make reforms or improvements possible" and, after citing several judgments, by saying that "[t]he majority have not made reference to this case-law, but that does not in our opinion change the reality of the situation that their conclusion is in fact based on a "dynamic and evolutive" interpretation of" Art. 3 P.1.⁸⁶ Even though they do not dispute the "important task for the Court to ensure that the rights guaranteed by the Convention system comply with "present-

⁸¹ *Ibid.* para. 82.

⁸² *Concurring Opinion of Judge Caflisch, Hirst Grand Chamber judgment*, para. 2

⁸³ *Joint Concurring Opinion of Judges Tulkens and Zagrebelsky, Hirst Grand Chamber judgment.*

⁸⁴ *Joint Dissenting Opinion of Judges Wildhaber, Costa, Lorenzen, Kovler and Jabens, Hirst Grand Chamber Judgment.*

⁸⁵ *Ibid.* para. 5.

⁸⁶ *Ibid.*

day conditions”, for them it is, nevertheless, “essential to bear in mind that the Court is not a legislator and should be careful not to assume legislative functions. An “evolutive” or “dynamic” interpretation should have a sufficient basis in changing conditions in the societies of the Contracting States, including an emerging consensus as to the standards to be achieved.”⁸⁷ And this is where the crux of the matter lay for what is important for evolutive interpretation is that it should follow state practice (and not any state practice but a conclusive one) – hence the head count. After all it is an “authentic interpretation” of the convention, or as close to it as the Court would get. It is not only the fact that the Court is not a legislature but it is not even a national or heavens forbid a Constitutional court, for if it were a national or a Constitutional court it would not be a problem for it to interpret evolutively and it would not be such a big “sin” since some European countries have express authorizations in their laws that courts can interpret evolutively (“in Switzerland, the civil code instructs judges that when all aids to interpretation fail, they should employ the rule they would adopt if they were a legislator”⁸⁸) while in others it is a matter of practice (for instance the German Constitutional Court has the doctrine of the limits of the wording).⁸⁹ To commit the sin of interpreting evolutively without grounding that interpretation in state practice in international law is to commit the sin of pretending to be nothing more and nothing less than a “normal” court – to play the game according to the specifications and limits set out by the different topics of law, to practice law pure and simple (pun intended for nothing in law is neither pure nor simple) with all the prejudices and all the baggage that that implies. To imply differently – to say that international courts are not like normal courts – is to imply that international law is not law since it is something altogether different in kind than national law or that international law is law but that international courts are not there to “do law” but to do something else, like coordinate or fix “collective action problems” where the burden of fixing these problems does not come at the burden of sovereignty, at least not beyond what was originally agreed.

However, there is one more curious thing to point out and that is that even the critic of the Court’s use of evolutive interpretation is made from the viewpoint of a constitutional separation of powers doctrine – the Court is usurping the power of the imagined legislator as if there was such a thing in international law. Using a separation of powers argument, an argument that is quite familiar from national law debates,⁹⁰ puts us back on the familiar footing of constitutional domains and shows how difficult it is to separate the adjudication of rights from constitutional notions – isn’t rights review a constitutional matter *par excellence*? It is this problem of mentally categorizing and linking one activity (rights review) with certain types of categories (constitutions, rights, public interest, individual autonomy) that brings instability to the margin of appreciation doctrine that cannot be easily cured by simply the Court giving in to its gentile nature and becoming a constitutional court of Europe⁹¹ for at

⁸⁷ *Ibid.* para. 6.

⁸⁸ John Henry Merryman and Rogelio Pérez-Perdomo, *The Civil Law Tradition : An Introduction to the Legal Systems of Europe and Latin America* (3rd edn, Stanford University Press 2007), p. 46

⁸⁹ See for instance the introduction in Matthias Klatt, *Making the Law Explicit : The Normativity of Legal Argumentation* (Hart Publishing 2008).

⁹⁰ See for instance in part the debates in US and France in Mitchel De S. O. L’E Lasser, *Judicial Deliberations : A Comparative Analysis of Judicial Transparency and Legitimacy* (Oxford University Press 2004; Mitchel de S. O. L’E Lasser, *Judicial Transformations : The Rights Revolution in the Courts of Europe*; Matthew J. Franck, *Against the Imperial Judiciary : The Supreme Court Vs. The Sovereignty of the People* (University Press of Kansas 1996; Mark Kozlowski, *The Myth of the Imperial Judiciary : Why the Right Is Wrong About the Courts* (New York University Press 2003) Jeremy Waldron, *Law and Disagreement* (Clarendon 1999).

⁹¹ A suggestion that is not unique but is coherently put forward by George Letsas, ‘Two Concepts of the Margin of Appreciation’ and the Court has as early as 1995 elevated the Convention to the status Convention as a “constitutional instrument of European public order”, making it the Highest Court of public law for Europe see *Loizidou v. Turkey (Preliminary Objection)*, Application no. 40/1993/435/514, 23 March 1995, para. 75.

the same time it also has to struggle with its international identity which creates other types of mental linkages like sovereignty, democratic deficit, treaties, law as fact etc. The Court has a structural problem of competing identities which produce conflicting results in its interpretation of the margin of interpretation for however much it struggles it will not be able to reconcile its split identity and will forever be harassed by its detractors who will think that it has either done too much and is acting as a court proper and not an international body which has intruded into the sovereign domain of a democratic legislature, or it has done too little because it has allowed a state to get away with a controversial action or has not created a uniform standard under the pretence of a margin of appreciation that is owed to states by an international court. And both types of criticism would be true if only within the concept of an international or a national High Court. In short, damned if you do and damned if you don't.

4. Conclusion

The Court has a divided audience as the reform debate has shown.⁹² On the one hand it has to engage with discussions and criticisms stemming from official channels, including "Strasbourg officials, diplomats and NGOs".⁹³ Some of these actors are "characterised by an unwillingness to discuss thoroughly what the primary functions of the Court could and should be, by minimalism, and by a mixture of confusion about, and hostility to and indifference towards, constitutionalisation."⁹⁴ On the other hand, the Court also has to engage with academics (mostly with a legal background) and judges on or off the Court on at least two sets of issues: how the Council of Europe can "encourage the institutionalization of those national process which reduce the risk of violation of Convention rights [...] and [...] enable them to be effectively addressed at national level"⁹⁵ and the second of "how the scarce judicial resources [...] can be deployed with maximum effect".⁹⁶ Unfortunately for the 'reform movements' the question of how to improve the functioning of the Court is "limited by the Convention framework"⁹⁷ which again is hampered by the lack of understanding of its basic functions. Crucially, "even after over more than half a century, there is still no firm consensus on what these [basic functions] are."⁹⁸ Nor is one likely to come out soon, I would add. Moreover, not all judges (past or present), and especially not all academics, see the Convention in a monist, public order paradigm and there are strong national traditions that put the Convention as just that a convention, an important even and indispensable one, but a convention nonetheless.⁹⁹

Consequently, it is not only that the Court's audience has different presuppositions about what the Court is supposed to do – this in and of itself is not unusual in the pluralistic societies that we live today. Courts have been and are muddling their way through increasingly pluralistic societies and while that may explain some instability in the

⁹² For an overview of the two parallel debates going on regarding the reform of the Court see Steven Greer and Luzius Wildhaber, 'Revisiting the Debate About 'Constitutionalising' the European Court of Human Rights' (2012) 12 *Human Rights Law Review* 655, p. 659-663.

⁹³ *ibid* p. 659.

⁹⁴ *ibid*.

⁹⁵ *ibid* p. 662.

⁹⁶ *ibid* p. 663.

⁹⁷ *ibid*.

⁹⁸ *ibid*

⁹⁹ Stéphanie Henneville-Vauchez, 'Constitutional V International? When Unified Reformatory Rationales Mismatch the Plural Paths of Legitimacy of ECHR Law' in Jonas Christoffersen and Mikael Rask Madsen (eds), *The European Court of Human Rights between Law and Politics* (Oxford University Press 2011), p. 150-157.

interpretation of different doctrines,¹⁰⁰ the problem of the ECtHR is much more fundamental than that. It is not only that it has a pluralistic audience – most courts do – but it is that it has a pluralistic composition as well, with former national judges sitting next to academics, former members of the national bureaucracies chiefly from ministries that deal with foreign affairs or justice, political appointees and human rights/NGO activists.¹⁰¹ In short, it has a divided interpretative community. Consequently, it is in this way that we can understand that honest debate that goes on in the dissenting and concurring opinions of the *Lautsi* and *Hirst* judgments, as members of an interpretative community trying to convince the other side of the rightness of its interpretation – the rightness of which can only be fully understood once we see the Convention from their respective perspectives. Moreover, they will honestly see the other side as misguided, ill-informed and simply wrong and their use of the doctrine as a “substitute for coherent legal analysis”.¹⁰²

This plurality of composition affects how the margin of appreciation is being interpreted and constructed case by case. In a national court embedded in historical, political and educational structures¹⁰³ professional norms keep the plausible interpretations within certain limits – hence the notion of plausible. But once a split identity develops doctrines like the margin of appreciation will be elusive – they will be “as slippery as an eel”. It is not obvious that this deficiency can be easily remedied with the members of the ECtHR “choosing” one identity over another. A simple choice of identities – even if choosing ones convictions is in the realm of the possible – will not cut it, simply choosing identities is not that easy for there are good reasons for the members of either camp to believe that they are right and the other are wrong – no wonder that judgments where the margin of appreciation is a deciding factor are followed with strong dissents like in the *Hirst* and *Lautsi* judgments. Ultimately we may have to accept that a better explanation for why the Court decided on the width of the margin one way rather than another to be the Court’s split identity that changes with each composition of the Sections or the Grand Chamber regardless of how many factors we might identify that may swayed the Court’s reasoning. In short and to the point, it is not a problem of doctrine it is a problem of fundamentals, one that cannot be easily overcome.

Scharf MP, ‘Seizing the Grotian Moment: Accelerated Formation of Customary International Law During Times of Fundamental Change’ 43 Cornell International Law Journal 439

¹⁰⁰ See for instance Michel Rosenfeld, *Just Interpretations: Law between Ethics and Politics* on the post-modernist challenge to indeterminacy and interpretation.

¹⁰¹ Voeten, Erik, Does a Professional Judiciary Induce More Compliance? Evidence from the European Court of Human Rights (March 27, 2012). Available at SSRN: <http://ssrn.com/abstract=2029786> or <http://dx.doi.org/10.2139/ssrn.2029786> (should ask permission to cite?)

¹⁰² Horne Lord Lester Hill, ‘Universality Versus Subsidiarity: A Reply’, p. 75.

¹⁰³ See for instance how education, professional norms and historical understandings constrain judicial bureaucracies in their interpretation of the law in Mitchel de S. O. L’E Lasser, *Judicial Deliberations: A Comparative Analysis of Judicial Transparency and Legitimacy*; but also see Pierre Bourdieu, ‘Force of Law: Toward a Sociology of the Juridical Field, The’ (1986) 38 *Hastings Law Journal* 805.